Supreme Court, U.S.
FILED

No. (1)

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IN THE

Supreme Court of the United States

RICHARD GEORGE,

Petitioner,

—v.—

NYC DEPARTMENT OF CITY PLANNING,
NYC DEPARTMENT OF BUILDINGS, and SHACAF ANKOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Does the mandate of the Coastal Zone Management Act (CZMA) of 1972 16 U.S.C. §1451 et. seq. and financial awards contracted to New York City to implement the CZMA through its Waterfront Revitalization Program and mandatory rules and regulations promulgated by the Secretary of Commerce provide for a private right of action.

2. Did the Second Circuit Court of Appeals draw al reasonable references in favor of the plaintiff, *pro se litigant* material set of facts in support of his claim which entitle him to relief to maintain access to the waterfront over his 24 ' wide open way expressly granted. The Second Circuit Court of appeals does not favor forfeiture of easement by express grant or under the CZMA id. This standard is applied with particular strictness when the plaintiff complains of a civil rights protection with his valid property right under 42 U.S.C. Section 1983 and Constitutional provisions under the First, Fifth and Fourteenth Amendments. Civil Rights protection that is also is of national public importance in maintaining federal uniformity and for the general Welfare of this Nation.

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Prayer

Richard George respectfully petitions this Court for a writ of certiorari to review the judgment and order of the Court of Appeals for the Second Circuit in the opinion below.

Opinion Below

The approval by New York City Department of City Planning and New York City Department of Buildings to Defendant Shacaf for construction of homes that will permanently obstruct the 24 foot right of way expressly granted in his deed that is also a public access to the waterfront. The plaintiff's pleadings that he has standing (1) under the Coastal Zone Management Act, 16 U.S.C. § 1451 *et. seq.* and, (2) Civil Rights Violations in the depravation of his valid property rights, with an injury of fact and irreparable harm had stated a claim upon which relief can be granted with a permanent injunction and removal of obstructions that is in violation of 42 U.S.C. Section 1983, the Fifth , Fourteenth and First Constitutional Amendment. Appeal from a Judgment of the United States District Court for the Eastern District of New York (Feuerstein *J.*) dismissing complaint in its entirety.

United States Court of Appeals for the Second Circuit. We affirm. Summary judgment order that (1) The Coastal Zone Management Act (CZMA) affords no private right of action by a citizen against city agencies and non-federal entities and, (2) The plaintiff's Civil Rights claims for violations under Title 42 U.S.C. Section 1983 and Constitutional claims under the 1st, 5th and 14th Amendments are without merit.

Statement of Jurisdiction

The Court of Appeals for the Second Circuit entered its judgment on January 25, 2006 Docket No, 05-0886-cv. This petition if filed within 90 days with extension of time granted up to and including October 2, 2006

Petitioner invokes this Courts Jurisdiction:

(1) Petitioner invokes the Jurisdiction of the Coastal Zone Management Act ("CZMA") of 1972 P.L. 92-583, 16 U.S.C. §1451 et. seq., and many Federal statutes are the ***authorities*** of New York City's Waterfront Revitalization Program's land and water use regulation in the Federal coastal zone boundary that include the Petitioner's property. The purpose intended by Congress was to provide financial incentives to states and local governments to undertake the responsibilities for setting up management programs in the coastal zone. New York City developed its Waterfront Revitalization Program that was approved and adopted for its coastal zone in accordance with rules and regulations promulgated by the Secretary CZMA Section 306 Administrative Awards §1455(d)(1).

The mandatory rules and regulations promulgated by the Secretary 15 C.F.R. §923.43 (i) the management program authorities provide for a citizen who is the intended beneficiary in taking action to ensure compliance of networked agencies with the program. The legal instrument of the financial award contract that binds New York City as an entity and recipient of awards to adhere to the authorities to implement the CZMA through its Waterfront Revitalization Program: ("WRP") and defined in 15

C.F.R §923.132 (e) in order to accomplish a public purpose authorized by Federal statute.

A large number of Federal statutes and regulations promulgated by the Secretary are the ***authorities*** that play a key role for waterfront revitalization of New York City and is its principal coastal zone management tool. The authorities include compliance with environmenta standards under the requirements of: ***The National Environmental Policy Act of 1969 P.L. 91-190 and E.O. 11514,*** assurances of project consistency with the approved State management program developed under the CZMA, conformance with the ***Clean Air Act 2 U.S.C. §7401 and Clean Water Act OF 1977 33 U.S.C. 1251-1387 P.L. 95-217, National Historic Preservation Act of 1966 16 U.S.C. 470, P.L. 102-575,*** all Federal statutes relating to discrimination not limited to the ***Civil Rights Act of 1964 P.L.88-352.*** Projects and activities are consistent with the approved management programs under ***CZMA P.L. 92-583 subsection 314*** that requires that program coverage procedures provided for and regulations issued under the ***Demonstrations Cities and Metropolitan Development Act of 1966 P.L. 89-754*** and ***Title IV of the Intergovernmental Cooperation Act of 1968 P.L. 90-577 shall be applied.***

In order to accomplish a public purpose the CZMA incorporated the recommendations of the **Council on Environmental Quality's First Annual Report together with the President's Message to Congress, Transmitted to Congress August 1970** that include Eminent Domain and Tax Policy:

Eminent Domain government the right to acquire lands and is also available for public benefits such as preserving easements for access to the public beach

§1452 (1) (2) (E) and NYC WRP Policy 8 supra, and preserving historic buildings and districts §1452 (1) (2) (F) assistance in the redevelopment of deteriorating urban waterfronts and ports, and sensitive preservation and restoration of historic, cultural, and esthetic coastal features; giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development, which programs should at least provide for— § 1452 (2)

Tax Policy where tax policy is a vital cog in deciding income and profit for land investors, suburban developers, urban developers, and landlords—the big influences of land use. Taxation is an essential tool in shaping the manmade environment and preserving the natural environment.

Where the U.S Treasury funds the public purpose of the relevant statutes and authorities consistent with the text and substance of the CZMA § 1452 (1) and (2) (A) – (K) id., is applicable to this petition.

Federal Policy applies to NYC WRP which is a product of Federal financial awards and controls. NYCWRP is funded with U. S. Treasury Congressional Appropriations under the Constitution, Article I, Section 9, Clause 7 and its WRP policies have their basis in Article I Section 8 of the U.S Constitution or Commerce Clause. Under the Supremacy Clause New York City with the receipt of Federal financial award must yield to this supreme ACT of the CZMA.

Congress intent is all telling in the text and substance of this Act:
§ 1452 (1) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the

Nation's coastal zone for this and succeeding generations;
(2) to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development, which programs should at least provide for—
(E) public access to the coasts for recreation purposes,
(F) assistance in the redevelopment of deteriorating urban waterfronts and ports, and sensitive preservation and restoration of historic, cultural, and esthetic coastal features,

And where New York City's Waterfront Revitalization Program Policies were approved for concurrence with the Act under §1455 (d) (1) consistent with section 1452 id. which are part of the legal and enforceable authorities of the CZMA for land and water use regulation part of the legal instrument of the CZMA contract award 15 C.F.R. §923.132 (e) includes Section 303 (E) and (F), Section 309 Public Access Requirements and ALL relevant State and Local WRP Policies.

NYC WRP Policy 8: Provides public access to and along New York's coastal waters. "This policy presents standards for public lands...and lands under water (public trust lands) id. These standards are intended to preserve existing access to the shoreline provided by facilities such as...easements on privately-owned land"

NYC WRP Policy 8.1 A: Preserve, protect and maintain existing physical, visual and recreational access to the waterfront, and Policy 8.1 B Maintain in

good repair existing public access areas to ensure public safety and enhance enjoyment.

NYC WRP Policy 10: to protect and preserve and enhance resources significant to historical, archaeological and cultural legacy.[1]

The CZMA implementation of Congressional Appropriations Article I §8, for the general Welfare of the United States, shall be uniform through out the United States, §1451(b) "to the present and future well being of the Nation" (e) essential to the well being of all citizens". The Federal subject matter jurisdiction that provide standing for this private right of action against the municipality.

Coastal Zone Jurisdiction:

Congress intended the coastal zone to be two regimes land and water. The ***exclusive jurisdiction of the Federal Government*** is the outer limit of the coastal zone is the outer limit of the territorial seas and

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[1] Policy 8 was approved being consistent with §1452 (303) (1) (2) (E); Policy 10 was approved by the U.S Department of Commerce for concurrence with applicable Federal law that include the CZMA §1452 (303) (1) (2)(F), NEPA and the National Historic Preservation Act, Civil Rights Act that is also part of compliance with the CZMA contracts award as defined in 15 CFR 923.132 (e) that NYC through its WRP is legally required to implement. The plaintiff's bungalow development which is an historic resource listed on the National Register of Historic Places approved by the Secretary of Commerce for concurrence with CZMA §1452 (1) (2) (F), NEPA and NHPA as included and defined in the contract award 15 C.F.R.923.132 (e). Where the plaintiff as a citizen can take action is explicit in the rules and regulations promulgated by the Secretary of Commerce 15 C.F.R 923.43 (i) as per the Mandatory requirements for approval and receipt of CZMA Administrative Awards §1455 (d) (1) (2) (3) through (16).

Outer Continental Shelf the ***where the States have no clear authority to act.***

State and local governmental jurisdiction include non-Federal coastal waters, non-Federal land beneath the coastal waters and the adjacent non-Federal shore lands including the waters therein and there under. The coastal zone extends inland necessary to allow the management program control of shore lands whose use has a direct and significant impact upon coastal waters CZMA Section 304 P.L. 92-583 *Defintions* Section 304. Where the authorities under the CZMA and regulations provide for a citizen to act to ensure compliance of networked agencies with the management program 15 C.F.R. §923 (i). Where the petitioner's property is in the coastal zone and he has presented two causes of action and stated a claim upon which relief can be granted to protect his valid property rights under the CZMA and;

(2) The Petitioner's Civil Rights claims for violations under Title 42 U.S.C. Section 1983 and basic rights established under the U.S Constitution 5th and 14th Amendments to the beneficial use of his 24 foot wide open way as an express contractual grant recorded in his deed. More recent judicial decisions provide protection for his rights to the use of the subject 24 foot wide open way as a public forum under the First Amendment U.S Constitution. This open way spans proximate public lands extending southerly from Seagirt Avenue to the public beach and Atlantic Ocean has been open to the pubic for over 80 years. There is no just compensation for the taking of a public access under the14 Const. Amend.

The nexus of the plaintiff's property is within the zone of interest of the Constitutional provisions CZMA and Civil Rights violations either separate or combined provide standing under Federal Subject matter jurisdiction.

Relevant Statutory Provisions

Coastal Zone Management Act ("CZMA") of 1972 P.L. 92- 583, 16 U.S.C. §1451 et. seq.,

National Environmental Policy Act of 1969 P.L. 91-190 and E.O. 11514,

Clean Air Act 2 U.S.C. §7401,

Clean Water Act OF 1977 33 U.S.C. 1251-1387 P.L. 95-217,

National Historic Preservation Act of 1966 16 U.S.C. 470, P.L. 102-575,

Civil Rights Act of 1964 P.L.88-352,

Demonstrations Cities and Metropolitan Development Act of 1966 P.L. 89-754

Title IV of the Intergovernmental Cooperation Act of 1968 P.L. 90-577

Submerged Lands Act

U.S Treasury and General Governmental Appropriations Act Section 515 P.L.106-554

Relevant Constitutional Provisions

U. S. Treasury Congressional Appropriations under the Constitution, Article I, Section 9, Clause 7,

Article I Section 8 of the U.S Constitution or Commerce Clause,

The Supremacy Clause

First Constitutional Amendment

Fifth Constitutional Amendment

Fourteenth Constitutional Amendment

Other Authority

The Public Trust Doctrine

New York City's Waterfront Revitalization Program and enforceable Policies 8 and 10

Statement of Case

(1) The CZMA Created A Private Right Of Action

Essential material facts:

On March 17, 2003 Richard George, *pro se litigant* ("Mr. George" or "petitioner") filed compliant United States District Court for violation of his property of an existing 24 foot wide open way (" 24' open way") that was expressly granted by the estate owner Edward N. Dickerson. The language in the deed expresses the intention of the estate owner who expressly granted free an uninterrupted passage assigned forever over the entire center of the 24 foot wide open strip extended and extending southerly from

Sea Girt Avenue along his property to the Atlantic Ocean to its successors and assigns, and to the owner or owners lessees or tenants of *all or any part* of the premises lying between the southerly side of Sea Girt Avenue and the Atlantic Ocean.

Mr. George provided the Court with deeds with the recording of the 24' open way annexed in exhibits B of the Defendant and C of his property and other property owners.

He also provided the Court with copies of the original deeds recorded October 19, 1891 Edward N. Dickerson and maps that that show the boundaries of the estate which was sold and subdivided into smaller parcels that is part Mr. George's property as recorded formerly the Edward N. Dickerson estate. He also annexed exhibits that show the Dickerson estate was 100% public trust lands of Far Rockaway Bay of Inlet and Outer Beach with the high water mark of the Atlantic Ocean extending north to Norton's Creek; exhibits annexed in Plaintiff's Affirmation maps A-1 through A-6 and original deed A-20, filed August 26, 2003 E.D.N.Y.

Mr. George provided the Court with the U.S. Department of Commerce Coastal Programs Division publication *Sustaining America's Coastal Communities and Resources a strategic framework for the coastal zone*. This publication provides the essential material facts that the Coastal Zone Management Act provides the framework and necessary tools for implementing this plan. The CZMA relies upon a unique partnership among federal, state and local governments page 12. Local government roles in coastal management range from development and implementation of coastal programs to receipt of CZM support for local projects page 13, which the map shows the land of petitioner is under Federal Government Jurisdiction page 10; as annexed in original complaint exhibit I, and Plaintiff's Affirmation A-7a through 7-c.

Public Access is specifically identified as one of the key priorities of the Coastal Zone Management Act (CZMA) of 1972 in its Declaration of Policy §1452 Section 303 (2)(E). Under CZMA § 1455 (b) (B) (v) to provide financial support to coastal states for use for investigating and applying the public trust doctrine to implement State management programs approved under section 1445 of this title which is applicable to NYCWRP Public Access Policy 8.

The right of the public to access the coast or waterfront is largely based upon the public trust doctrine incorporated into the American legal system so that tidelands are held in public trust. The public trust doctrine was incorporated into NYC WRP Public Access 8. See Steve Resler's Supervisor Consistency Review Analysis Coastal Management Program Pre filed Testimony on public access policies annexed in original complaint exhibit D.

The public's right in publicly owned foreshore and underwater are paramount to any private rights. Therefore there should be no unnecessary obstruction and encroachment by a littoral owner or approvals by New York City Defendants to the detriment of the public's right of access to, in and over the 24 ' open way extending southerly from Seagirt Avenue over the public trust lands of the Atlantic Ocean to access the Atlantic Ocean and public beach that were artificially filled and part of petitioner's property today. See A discussion paper *Public Trust Doctrine and Public Access in New Jersey* prepared by the Urban Harbor's Institute of the University of Mass. Boston under contract with the New Jersey Coastal Zone Management Program. Annexed in Plaintiff's Affirmation exhibit A-14.

The constitutionality of New Jersey's CZMA public access rules and regulations where upheld *See; National Association of Homebuilders of the U.S. and*

New Jersey Builders Assn. v. State of New Jersey Department of Environmental Protection et. al., 64 F. Supp. 2d. 354; 1999 U.S. Dist. LEXUS 14678; Federal District Judge Garret E. Brown Jr. ruled almost 90 percent of the land on the walkway was filled land and below the mean high water line of the Hudson River. Therefore, the land was public trust land and the state was within it's police powers to require the walkway construction and maintenance is applicable with this case at bar and Writ of Cert.

Where the text and substance of Congress in the CZMA requires concurring enforcement provisions under the rules and regulations promulgated by the Secretary 15 C.F.R. §923.43 (i) The management program authorities provide grounds for taking action to ensure compliance of networked agencies with the program. It will be sufficient if any of the following can act to ensure compliance: The State agency designated pursuant to subsection 306(d)(6) of the Act, the State's Attorney General, another State agency, a local government, or a citizen. Richard George as citizen has standing to take action and ensure compliance of NYC with its WRP Public Access Policy and all WRP policies that include Policy 10. *See* **Statement of Jurisdiction** id.

NYC WRP was approved by the Secretary of Commerce on September 30, 1982 for concurrence with applicable Federal laws and regulations. **NYC's Waterfront Revitalization Program** applies to all projects in the coastal zone; *See CEQR MANUEL P. 4-17 annexed in Plaintiff's Affirmation exhibit A-18* and, **Public Access to the Waterfront:** Any area of publicly accessible open space on a waterfront property, as well as pedestrian way that provides a route from a waterfront public access area to a public street, public

park, public place, or public access area; *See CEQR MANUEL P 4-12 annexed in Plaintiff's Affirmation exhibit A-18;* And is applicable with the petitioner's 24' open way spanning proximate public lands Seagirt Avenue to the pubic beach and ocean which has been open to the public since 1920 to the present day both as a easement by express grant and as a public access to the waterfront protected under the CZMA and Civil Rights 42 U.S.C.§ 1983, and under the Constitution and 1st, 5th and 14 Amendments, U. S. Treasury Congressional Appropriations, Article I, Section 9, Clause 7 and its WRP policies have their basis in Article I Section 8 of the U.S Constitution or Commerce Clause. Also under the Supremacy Clause and the Submerged Lands Act with New York City with the receipt of Federal financial award must yield to this supreme ACT of the CZMA.

Ankor Shacaf sold his properly to Second Stage the complaint remains against the New York City Respondents/Defendants.

Relevant Federal laws and regulations:

NYC's WRP management program has its basis in *Article I Section 8 of the Commerce Clause* funded through the U.S House of Representatives Committee on Appropriations " No Money shall be drawn from the Treasury in Consequence of Appropriations made by Law " *U.S. Constitution, Article I, Section 9, Clause 7".* Where the CZMA Administrative Awards §1455 (d) Section 306 Appropriations mandatory rules and regulations of the Secretary explicitly provide judicial action 15 C.F.R. §923. 43 (i), id. The State, local governments have not taken action to ensure compliance the plaintiff as citizen has standing to take action to ensure compliance of networked municipal

agencies to implement Policy 8 and 10 as required under the CZMA and contract award contract.

Article I, §8 states that " Congress shall have Power TO lay and collect Taxes, Duties, Imposts and Excises, tp pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States."

Congress has broad power to spend for the general welfare and has done so through the Coastal Zone Management Act of 1972 legislation CZMA Administrative Awards §1455 (d) Section 306 Congressional Appropriations and mandatory rules and regulations 15 C.F.R. PART 923. New York must yield to this supremacy under the Supremacy Clause. *Gibbons v. Ogden* 22 U.S. (9 Wheat) 1 (1824). Chief Justice Rehnquist, approved conditions imposed by Congress directly related to the main purpose behind federal highway money: creating safe interstate travel. award *South Dakota v. Dole* 483 U.S. 203 (1987). The petitioner with this writ request that the U.S Supreme Court have the New York City municipality identified as a recipient of federal money to implement the CZMA §1452 (1) (2) (E) and provide, protect, preserve and maintain existing public access to the waterfront for the public and (F) assistance in the redevelopment of deteriorating urban waterfronts and ports, and sensitive preservation and restoration of historic, cultural, and esthetic coastal features under their federally approved management program. Municipal corporations are political subdivisions of the State. As such, municipal corporations may exercise only such powers expressly granted to them, subject only to those powers delegated to the Federal Government in the Constitution Article I §8; §9 id., See *Martin v. Wadell,*

41 U.S. (16 Pet) 367, 10 L. Ed. 997 (1842); Also see Lands Under Water Part 13 Local Regulation §77.68 Warren's Weed New York Real Property.

A suit to enforce a property right one time governed by Federal law arises under Federal law if it continues to govern that right *State of N.Y. v. DeLyser* 759 F. Supp. 982, 989 (W.D.N.Y. 1991) provides standing to the plaintiff Richard George and his property over artificial fill of public trust lands *Federal Question Jurisdiction* under the *Public Trust Doctrine and the CZMA. Also see Opinion Michigan Supreme Court, Lansing, Michigan, Glass v. Goeckel* No.126409, 473 Mich.L. 67; 703 NW2d. 158; and *Raleigh Avenue Beach Assn.V. Atlantis Beach Club., et al* SUPREME COURT OF NEW JERSEY NO A-40 September Term Decided July 26, 2005. Cases relevant to petitioner's property and tights of access over the bungalow development and the 24 ' open way in and over of 100% public trust lands of the Atlantic Ocean; also See *See; National Association of Homebuilders of the U.S. and New Jersey Builders Assn. v. State of New Jersey Department of Environmental Protection et. al.*

The Federal Question of standing has also been provided with a decision from the Eastern District of New York *Town of N. Hemp. v. Village of N. Hills* 482 F. Supp 900, 903 (E.D.N.Y. 1979), the city acting as partners with the Federal Government with the receipt of federal aid or any federal involvement provide grounds for the plaintiff to take action against the municipality and developers for various violations of Federal law. New York City's agencies required to implement the ***authorities*** of the CZMA through its Waterfront Revitalization Program and the financial award contract as defined in 15 C.F.R. §923.132 (e); See *Proetta v. Dent*, 484 F.2d. 1146, 1148 (2d.

Cir.1973); *Silva v. Romey*, 473 F.2d. 287, 289-290 (1Cir 1973); *Stutchin v. Town of Huntington* 71 F. Supp.2d 76 (E.D.N.Y.1999), where the Eastern District of New York determined that Federal Policy applies once the Local Waterfront Revitalization Program (LWRP) has been approved by the Secretary of Commerce, the LWRP passes constitutional muster.

Federal District Judge Garret E. Brown Jr. also upheld the constitutionality of the CZMA Public Access Rules and Regulations *National Association of Homebuilders of the U.S. and New Jersey Builders Assn.* id.

There can be no just compensation to the petitioner as there can be no taking of a public access to the waterfront protected under the CZMA Public Access Policy and the 5th Const. Amend. More recent decisions of the Eastern District of New York provide protection under the First Amendment as a public forum. See *Paulsen v. Lehman* 839 F. Supp.147,160-161, 170,(E.D.N.Y. 1993), the right of passage over existing public access areas belongs only to members of the public as a public forum, and the Eleventh Circuit in *Naturalists Society v Fillyaw* 958 F2d. 1515, 1522 (11th Cir.); also *Leydon v. Town of Greenwich* (SC 16356) (SC 16357).

The Third Circuit U.S. Court of Appeals determined that a public easement must be specifically authorized by the municipality through legislative grant *RKO Stanley v. Mellon National Bank* 436 F. 2d.1297, 1303 (1970) and is applicable with the CZMA id. The public policy guaranteed under the WRP CZMA Article I §8, and funded under Article I, §9, id., and expanded scope of protection public access to the waterfront § 1452 (1) (2) (E) id., prevents the acquisition of these

public access rights for private use against the municipality, the public and petitioner, to protect, preserve and maintain existing public access to the waterfront Policy 8 id.

The CZMA funded with Congressional Appropriations Article I §8 for the general Welfare of the United States , shall be uniform through out the United States. To "preserve, protect, develop and whenever possible to restore or enhance the resources of the nation's Coastal Zone" §1452; the future well being of the Nation" §1451 (b), of "the well-being of all citizens;" §1451 (e). " These phrases do not suggest an intent to benefit any particular class, but to promote the interest of all" *New York State v. DeLyser,* 759 F. Supp. 982, 988 (W.D.N.Y. 1991).

The CZMA was designed to include "broad participation" in developing coastal zone management tools and in implementing the CZMA through approved local waterfront revitalization programs. The receipt of §1455 (d) Section 306. Administrative Awards requires mandatory *"full participation by relevant Federal agencies, State agencies, local governments, regional organizations, port authorities, and other interested parties and individuals, public and private, which is adequate to carry out the purposes of this title consistent with 16 U.S.C. §1452 Section 303"*. See also regulation §923.43 (c) (1) (2) (i) a citizen can take action id.

The regulation 15 C.F.R. §923. 43 (i) promulgated by the Secretary explicitly provide judicial action by a citizen; The award contract is defined in 15 C.F.R. §923.132 creates a relationship between the Federal government and another entity (recipient). The principal purpose of the award is the transfer of money

or services in order to accomplish a public purpose authorized by Federal statute.

The authorities within the award contract explicitly proved for citizens suits. The Demonstrations Cities and Metropolitan Development Act of 1966 P.L. 89-754, *Rodriguez v. Barcelo,*358 F. Supp. 43 (D. Puerto Rico, May 15, 1973); the Intergovernmental Cooperation Act of 1968 P.L. 90-577, 82 Stat. 1098; the Council on Environmental Quality's Mandate 40 C.F.R. §§ 1500.3 National Environmental policy Act of 1969 P.L. 91-190, 42 U.S.C. 4321 et. seq., the Environmental Quality Improvement Act of 1970, as amended 42 U.S.C. 4371 et. seq., Section 309 of the Clean Air Act 42 U.S.C. 7401 et. seq., as amended 42 U.S.C. 7609, Clean Water Act 33 U.S.C. 1251 et. seq., and Executive Order 11514, Protection and Enhancement of Environmental Quality Executive Order 11991 with the filing of an environmental impact statement that will result in affecting the environment with irreparable injury to the public and petitioners [40 C.F.R. §1500-1508 regardless of what agency Federal, non-Federal or person undertakes such action] also under Civil Rights violations under 42 U.S.C. §1983. *Town of N. Hempstead v. Village of N. Hills,* id. and in the receipt of federal financial awards *Gwaltney of Smithfield Ltd. V. Chesapeake Bay Foundation, Inc. et al.* 484 U.S. 49; Civil Rights violations *Hofferber v First National Bank* 437 F, Supp 788 injunctive relief was brought on the theory that defendants conspired to deprive plaintiff of her constitutional rights and in violation of Civil Rights Act and is applicable where the respondents have deprived the petitioners of their constitutional rights, Civil Rights Act, First, Fifth and Fourteenth Amendments.

Eminent Domain and Tax Policy:

Where U.S Congressional Appropriations Article I §8; §9 that fund a public purpose that preserve, protect, enhance and revitalization of coastal communities and neighborhoods, and important ecological, cultural, historic and esthetic values 15 U.S.C. §1451; §1452, § 1455 (d) id. The CZMA legally requires under the contract award 15 C.F.R §923.132 (e) a heightened standard of review when the public purpose authorized by the statute does not justify the use of eminent domain as cited in writ of certiorari to the U. S. Supreme Court *KELO v. City of New London Ct. et al* 268 Conn. 1, 843 A.2d. 500 and is relevant and applicable with this writ of certiorari. To protect, preserve, maintain, enhance and revitalize what Congress Declared under the CZMA §1452 (1) (2) (A) through (K) that New York City and all coastal States and municipalities must adhere to under the contract award. The federal funds of the contract award protect against any takings through eminent domain for economic development. See *South Dakota v. Dole* id. with NYC WRP identified as a recipient of federal money to implement the CZMA. The petitioner with this writ of certiorari request that the U.S Supreme Court have the New York City municipality comply with, and adherer to the CZMA contract award as defined in 15 C.F.R. §923.132 (e). There can be no taking of public or private property protected under the CZMA and authorities funded through U.S Treasury id. The CZMA implementation of Congressional Appropriations Article I §8, for the general Welfare of the United States, shall be uniform through out the United States, §1451(b) "to the present and future well being of the Nation" (e) essential to the well being of all citizens" .

See; *Eminent Domain, Tax Policy, NYCWRP Policies 8 and 10* id.

Pursuant to federal statute, regulations, standards and coordination among all Federal, State, City and individuals conducting activities the approvals by an agency for permits, licenses, certificates, or other entitlement or to otherwise authorize a proposed project or activity in the coastal zone as outlined in the original pleadings and this petition. The Federal Supremacy of these authorities that New York City respondents must yield to and federal courts will take jurisdiction because it turns on a federal question.

The Second Circuit Court of Appeals erred with their decision that the CZMA does not create a private right of action. Like substantive Federal Law to discover whether Congress intended the CZMA to be enforceable by a private right of action the Court should look to the "text and structure" of the Coastal Zone Management Act[2] (CZMA) 16 U.S.C. §1451 et. seq. There is nothing in the text that contemplates " public enforcement only" in the Appeal discussion of Circuit Judge Dennis Jacobs citing *Alexander v. Scandoval,* 532 U.S. 275, 286; Gerosa *v. Savasta & Co.*, 329 F 3d 317 (2d Cir. 2003). The Act is all telling in providing financial awards Section 306 §1455 (d) with the *opportunity of **full participation*** by State agencies, local governments, regional organizations, port authorities, and ***other interested parties and***

[2] The Appeal Panel should not be looking at the text and structure of other statutes such as ERISA which is irrelevant to the CZMA cited by Circuit Judge Dennis Jacobs who has decided to be a judicial activist by assuming and contemplating what Congress intended of the CZMA from the text of ERISA in *Gerosa v. Savasta* 329 F. 3d.317 and other unrelated educational statutes *Alexander v. Sandoval,*532 U.S. 275 are irrelevant and inapplicable to this case at bar.

individuals, public and private, which is adequate to carry out the purposes of this chapter and is ***consistent with the policy declared in section 1452 of this title.*** In Gerosa *v. Savasta & Co.* ,at 328, the principal goal is to " protect... the interest of participants in employee benefit plans and their beneficiaries." 29 U.S.C. 1001(b). The U.S Court of Appeals for the Ninth Circuit found that ERISA carefully enumerates the parties entitled to seek relief under §502... participants, beneficiaries, or fiduciaries with an express cause of action. The U. S. Court of Appeals for the Second Circuit in looking at the text and structure of the CZMA would find that §1451 (a) " there is a national interest in effective management, beneficial use, protection and development of the coastal zone"...(b) "to the present and future well being of the Nation ." (e) essential to the well being of all citizens" (g) "being damaged by ill planned development" § 1452 (1) " to preserve, protect, develop, and where possible to restore and enhance, the resources of the Nation's coastal zone for this and succeeding generations;" §1455 (d) " with the opportunity for full participation by... other interested parties and individuals, public and private... consistent with ...section 1452" and the mandatory rules and regulations promulgated by the Secretary 15 C.F.R. §923. 43 (i) provide for a citizen the take action. The petitioner's is entitled to the relief sought with his cause of action to ensure compliance of networked respondent city agencies with the management program's public access and historic preservation requirements Policy 8 and 10 that concurs with Federal law CZMA §1452 (1) (2) (E) (F). The CZMA created private right of action and standing in which federal courts will take jurisdiction because it turns on a federal question.

To the extent that the municipality is found acting in partnership with the Federal Government with the receipt of federal aid or any federal involvement provide grounds for the plaintiff to take action against the municipality and developers for various violations of Federal law: See *Town of N. Hemp. v. Village of N. Hills* id.; *Proetta v. Dent* id; *Silva v. Romey* id.; *Stutchin v. Town of Huntington* id. This relevant case should have been applied by the Appeal Panel against the municipality.

The "text and structure" of the Act is all telling. The Mandatory Requirements for Administrative Awards under CZMA § 1455 (d) that include applications for Federal Assistance under *other Federal programs* 16 U.S.C. §1456 (d); 16 U.S.C. §1456 (b); are approved only if the Secretary finds that the management program and application *for other federal aid* meets all applicable requirements of the Act ***consistent with the policy declared in section 1452 of this title*** and the **mandatory rules and regulations promulgated by the Secretary** 15 C.F.R. §923. 43 (i) id.

The interpretation favored by other circuits and by district courts in this circuit namely that the Coastal Zone Management Act the general intent to enhance state authority creates no implied right of action by a State against a private individual with a Federal permit in the exclusive jurisdiction o the Federal Government; *Dep't of Envtl. Prot.& Energy v. Long Island Power* 30 F. 3d 403, 423 (3d Circuit 1994); also *Calif ex rel Brown v Watt* 683 F. 2d 1253, 1270 (9th Cir. 1982); Also See **Coastal Zone Jurisdiction,** petition id. This case law cannot be used by the Second Circuit to "assume" or "contemplate" that the plaintiff's private right of action against the

municipality nor can it be construed as a State implied right of action against an individual with a Federal permit. The Appeal Panel 05-1784 has also used this misinterpretation against plaintiff *a pro se litigant* for purposes of collateral estoppel or *res judicata* which amounts to judicial activism by legislating from the bench. To prevent any more misinterpretation of the "text" and "substance" of the CZMA substantive Federal law with this, all other circuits and district courts the petitioner prays for the grant of a writ of certiorari by U. S Supreme Court.

The *Town of N. Hemp v. Village of N. Hills* id. citing Commonwealth of Mass. v. Andrus, 594 F. 2d. 872, 880, 1 Cir 1979) " [The Act] is neither a jurisdictional grant, nor basis for stating a claim upon which relief can be granted by a State of Massachusetts against a private individual Andrus. The plaintiff is not a State. The municipality is not an individual with a Federal permit. The misinterpretations of case law as cited by Circuit Judge Dennis Jacobs are irrelevant to Mr. George's actions and should not have been used by the Second Circuit Appeals in both 05-0886 and 05-1784 to dispose of this case at bar.

A suit to enforce a property right one time governed by Federal law arises under Federal law if it continues to govern that right *State of N.Y. v. DeLyser* 759 F. Supp. 982, 989 (W.D.N.Y. 1991). The case law presented with this petition is applicable to the plaintiff and his property over artificial fill of public trust lands *Federal Question Jurisdiction* under the *Public Trust Doctrine and the CZMA.*

The CZMA has created a private right of action. The close nexus of his Civil Rights and Constitutional Claims to his property rights of access to the waterfront

provide standing under both claims. The petitioner, Richard George, respectfully requests and prays for a *writ of certiorari.*

(2) The Petitioner's Civil Rights and Constitutional Claims

Petitioner has established standing with a valid claim under Title 42 U.S.C.A. Section 1983 for violations of Fifth, Fourteenth Amendments acknowledged by Magistrate Judge Bloom and Honorable Robert Sack which is part of the legal record. A final decision was made by New York City Department of Buildings and Department of City Planning approval of permits for new construction that obstruct plaintiff's easement in violation of his property rights and rights to Due Process. There were no public hearings on vacating this easement which is also defined in relevant case law as a public access to the waterfront. There is no just compensation for vacating a public easement for a private use. The plaintiff is also entitled to injunctive relief against defendant based on depravation of his First Amendment rights to the use of this easement as a public forum. Relevant case law of the Eastern District provides plaintiff relief on this claim was overlooked by the Appeal Panel; *see Paulsen v. Lehman* 839 F. Supp.147 (E.D.N.Y. 1993) defendants permanently enjoined, along with agents, employees and successors, and all persons subject to their discretion and control, from imposing any unlawful restraint on plaintiff's right to engage in other First Amendment activities within the pedestrian walkways, thoroughfares and boardwalk area which apply to the plaintiff and 24 foot wide open way.

When the plaintiff complains of a civil rights violation a court must accept the allegations contained in the compliant as true, and draw al reasonable

references in favor of the plaintiff, *pro se litigant.* The plaintiff has proven beyond doubt the set of facts in support of his claim which entitle him to relief *Conley v. Gibson,* 355 U.S. 41, 45-46. This standard is applied with particular strictness when the plaintiff complains of a civil rights violation, *Sheppard v. Beerman* 18 F. 3d. 147, 150 (3d Cir. 1994). The claim is sufficient to confer jurisdiction upon federal court, when action is brought on the theory that defendant's conspired with developers to deprive plaintiff of his constitutional rights in violation of Civil Rights Act, *Hofferber v. First National Bank of Gymon, OK* 437 F.Supp.788 (1977).

The plaintiff's papers and exhibits attached thereto support his claim to his property right of an easement by express grant. The United States Court of Appeals Second Circuit does not favor forfeiture of easements by express grant *Penn Central Transp. Co. v. Pirate Canoe Club Inc.* 463 F.2d 127. .When the intent of the owner is to maintain a perpetual open way. *Holloway v. Southmayd* 130 NY Reports 309, 390 Fed. 825 (1893) " Private easements are independent of the public easement, and are in nature as indestructible by acts of the public authorities, or of the grantor in such a deed

The Third Circuit Court of Appeals prevented the city from vacating sidewalk and issuing building permit for new construction in and above sidewalk to which was in private hands, *RKO-Stanley Warner Theatres v. Mellon Nat. Bank* 436 F. 2d.1297,1298, 1300-1303. A case of *First Impression* for the Court of Appeals Second Circuit with the petitioner's case at bar to enjoin the city from vacating this 24' easement for new construction that has been open to the public for over 85 years. (emphasis added).

The set of material facts that were overlooked and further support of petitioner's claim, the subject parcel of property was predominantly 100% public trust lands of the Atlantic Ocean, its outer beach and high water line of the Bay of Far Rockaway extending north the Norton's Creek. These public trust lands were artificially filled and subdivided into smaller parcels for the construction of the subject bungalow development and its infrastructure of pedestrian walks. The set of facts pleaded by plaintiff are supported with documented evidence of 1910 maps of estate and assessment of property showing high water line 1910 - 21 show the southern boundary of the Dickerson estate as the Atlantic Ocean with its high water line extending into Bay of Far Rockaway into Norton's Creek estuary at the northern boundary recent tax maps, surveys and deeds filed at the Queens City Register. The Dickerson estate expressly granted several easements ensuring not only the property owner's rights for "free and uninterrupted" access over these lands but also the public's dominate right of access in and over these public trust lands of the outer beach, Bay of Far Rockaway and Norton's Creek.

The original deed states:
"TOGETHER with all the right, title, and interest of the party of the first part of, *in and to the lands under the Atlantic Ocean in front of and adjoining said premises, together will all riparian rights appurtenant to said premises. TOGETHER with a Right of Way to the party of the second part, their heirs and assigns forever, for free and uninterrupted passage over...said strip twenty four feet in width running at right angles to Sea Girt Avenue (formerly Bay Avenue) extended, and extending form Sea Girt Avenue southerly to the Atlantic Ocean,"* recorded in Liber 2395 page 98, recorded January 24, 1922 by Dickerson Estates. (emphasis added).

The public is entitled to the "free and uninterrupted passage" said strip of land in and over these navigable waters and submerged lands of the estate. The grid of pedestrian walks infrastructure is constructive notice of access over these public trust lands connect to the Atlantic Ocean; See *National Association of Homebuilders of the U.S. and New Jersey Builders Assn. id.* The plaintiff referenced original deed of 1921 id. as annexed in Exhibits B and C; and in Appeal Brief Exhibit # 16 and on page 4 Complaint 03-CV-1295.

The Second Circuit Court of Appeals granted summary judgment de novo in favor of plaintiff giving no deference to district court's determination of state law., *Sutera v. Go Jokir Inc.* 86 F.3d 289 (2nd Cir. 1996) applicable to Mr. George's claims.;301 *Id.* the Second Circuit Court of Appeals favors injunction against obstructions of easements. Appeal Panel should have ordered summary judgment in favor of plaintiff with this case at bar. *See Columbia Gas Trans. v. Bishop* 809 F. Supp. 220, 222 (W.D. N. Y. 1992). Also *Bachmen v. Hecht* 659 F. Supp. 308, 309 (D. Virgin Islands 1986) also see, *Gisondi v. Nyack Mews Condominium* 673 N.Y.S.2D 743.

The District Court and Court of Appeals Second Circuit as well as other circuits favor injunction and removal of obstructions off of easements which is petitioner intention with this *writ of certiorari* to facilitate a proper decision on the merits and with no issue of material fact to be decided the plaintiff is entitled to judgment in has favor of his beneficial use to the subject 24 'open way under F. Rule Civ. P. 56.

Reasons for Granting the Writ

The United States Court of Appeals Second Circuit has entered a decision in conflict with other circuit decisions and various state court decisions so far and departed from the accepted and usual course of judicial proceedings.

The Congressional Appropriations Article I Section 8 for the general Welfare of the United States, shall be uniform throughout the United States for the future well being of the Nation, the well being of all citizens. Where a heightened standard of review shall be applied through the CZMA, Civil Rights, Constitution, Eminent Domain and Tax Policy to protect the public purposes that are of national importance. To preserve, protect, develop, restore and enhance the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development that should be reviewed and settled by the United States Supreme Court.

Conclusion

WHEREFORE, Petitioner Richard George respectfully prays that this Honorable Court grant this petition and issue and writ of *certiorari* to vacate or review the judgment of the Second Circuit, or remand for further consideration, or both, along with any other appropriate relief.

Dated: October 2, 2006

Respectfully submitted.

Richard George, *pro se*
170A Beach 24th Street
Far Rockaway, New York 11691
(718) 868-3123

APPENDIX

APPENDIX

Opinions, orders, findings of fact, and conclusions of law entered with the judgment sought to be reviewed

(i) UNITED STATES OF APPEALS FOR THE SECOND CIRCUIT

August Term 2005

(Argued: October 21,2005 Decided: January 25, 2006)

Docket No. 05-0886-cv

RICHARD GEORGE,

Plaintiff-Appellant,

—v.—

NYC DEPARTMENT OF CITY PLANNING, NYC DEPARTMENT OF BUILDINGS, and SHACAF ANKOR,

Defendants-Appellees.

Before:

OAKES, JACOBS,AND SACK,
Circuit Judges.

Appeal from a Judgment of the United States District Court for the Eastern District of New York (Feuerstein, J.) dismissing the complaint on the ground that there is no private right of action granted by the Coastal Zone Management Act, 16 U.S.C § 1451 *et seq. (2004).* Affirmed.

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720-1-30-2005-USCA-80004 FY90
RECORD PRESS, INC., 157 Chambers St., N.Y. 10007 (212) 619-4949

RICHARD GEORGE, *Plaintiff- Appellant, pro se.*

SCOTT SHORR, Corporation Counsel of the City of New York, New York, NY representing *Defendants-Appellees NYC Department of City Planning and NYC Department of buildings.*

DENNIS JACOBS, Circuit Judge:

The complaint alleges that the New York City Department of Buildings granted various building permits for a fence that obstructed a public right of access to a beach on the Atlantic Ocean, and that the City approved the fence without reviewing its environmental impact, violating public and private rights guaranteed by the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.* (2004)

Magistrate Judge Lois Bloom filed a Report and Recommendation in October recommending that the complaint be dismissed on the pleadings pursuant to Rule 12 © of the Federal Rules of Civil Procedure, on the ground that the Act does not afford a private right of action against city agencies. The United States District Court for the Eastern District of New York (Feuerstein,

J.), adopted the Report and Recommendation in its entirety. We affirm.

DISCUSSION

A grant of judgment on the pleadings is reviewed *de novo;* we affirm only if plaintiff would not be entitled to relief under any set of alleged facts. Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir.1994).

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval,* 532 U.S. 275,286 (2001). Plaintiff challenges the City's compliance with the following chapter of the Act:

State and local governments submitting applications for Federal programs, in or outside of the coastal zone...shall indicate the views of the appropriate state or local agency as to the relationship of such activities to the approved management program, except upon a finding by the Secretary that such project is consistent with the purpose of this chapter or necessary in the interest of national security.

16 U.S.C. § 1456 (d) (2000) (emphasis added).

To discover whether Congress intended that the Act be enforceable by a private right of action, we look to the "text and structure" of the statute. *Sandoval,* 532 U.S.at 288. Where the text explicitly contemplates public enforcement only, courts will assume Congress intended to preclude private right of action. The Act specifies a remedy against state or city agencies that

Proceeds without consistency review: the denial of "applications for Federal assistance under other Federal programs." 16 U.S.C. § 1456 (d); *see also*, 16 U.S.C § 1455 (b) (2000) ("The Secretary may make a grant to a coastal state under... this section only if the Secretary finds that the management program of the coastal sate meets all applicable requirements of this chapter...."). It is telling that the Act specifies a mechanism for enforcing the consistency requirement against sate and city agencies without mention of any private right of action.

As the Third Circuit conclude the Act's "general statement of intent to enhance state authority, given effect through explicit measures in the statute itself, cannot be taken to indicate an intent also to create rights of actions that the statue fails to mention." *Dep't of Envtl. Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 423 (3d) Cir. 1994); *see also California ex re. Brown v. Watt, 683* F.2d 1253, 1270 (9th Cir. 1982), *rev'd on other grounds,* 464 U.S. 312 (1984) (assuming, though not deciding, that no private right of action is available under the Act. District Courts within the Second Circuit have likewise declined to find a private right of action in the Act. *See Town of N. Hempstead v. Vill. of N. Hills*, 482 F. Supp. 900, 905 (E.D.N.Y. 1979) ("[The Act] is neither a jurisdictional grant, nor a basis for stating a claim upon which relief can be granted."):*see also New York v. DeLyser,* 759 F. Supp. 982, 987 (W.D.N.Y. 1991) (suggesting that only possible private right of action under the Act would be against the federal government through the Administrative Procedure Act).

We adopt the interpretation favored by other circuits and by district courts in this Circuit, namely, that the

Coastal Zone Management Act creates no private right or action against city agencies.

We have considered all of plaintiff's other claims and consider them to be without merit. The decision of the district court is affirmed.

(ii) Mandate

MANDATE
United States Court of Appeals

FOR THE
SECOND CIRCUIT

JUDGEMENT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 25th day of January, two thousand and six.

Before Hon. James J. Oakes
Hon. Dennis Jacobs
Hon. Robert Sack
Circuit Judges

Docket No. 05-0885-cv

RICHARD GEORGE,

Plaintiff-Appellant,

v.

NYC DEPARTMENT OF CITY PLANNING, NYC DEPARTMENT OF BUILDINGS AND SHACAF ANKOR

Defendants-Appellees,

Appeal form the United States Court for the Easter District of New York,

This cause came on the be heard on the transcript of record from the United States Court for the Eastern District of New York and was argued by counsel.

On considerations whereof, it is herby ORDERED, ADJUDICATED AND DECREED that the judgment of said District Court be and id hereby ARFFIRMED in accordance with the opinion of this Court.

FOR THE COURT:
ROSANNE B. MACKEHCHNIE, Clerk
by
s (_____)
Arthur M. Heller
Motions Staff Attorney

A TRUE COPY
Roseanne B. MacKechnie, Clerk
by *s (Deborah Holmes)*
DEPUTY CLERK

(iii)

Supreme Court of the United States
Office of the Clerk

Mr. Richard George
170A Beach 24th Street
Far Rockaway, NY 11691

Re: Richard George
v. NYC Department of City Planning et. al.
Application No. 05A1164

Dear Mr. George,

The application for an extension of time within to filed a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsberg, who on June 15, 2006 extended the time to an including October 2, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Sutter, Clerk

By s/ (' ')
Clayton Higgins
Case Analyst

NOTIFICATION LIST

Mr. Richard George
170A Beach 24th Street
Far Rockaway, NY 11691

Clerk
United States Court of Appeals for the Second Circuit
1702 US Courthouse, Foley Sq.
New York, NY 10007

(iv) REPORT AND RECOMMENDATION
03 CV 1295(SJF)(LB)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
_____X

RICHARD GEORGE

Plaintiff,

-against-

ANKOR SHACAF, NEW YORK CITY DEPARTMENT OF CITY PLANNING, QUEENS OFFICE, NEW YORK CITY DEPARTMENT OF BUILDNGS, QUEENS OFFICE

Defendants.

_____X

BLOOM, United States Magistrate Judge:

Plaintiff brings the instant action pro se alleging defendants violated his rights under the Due Process Clause of the Fourteenth Amendment and under the Coastal Zone Management Act, ("CZMA") 16 U.S.C § 1451.[1] The New York City Department of City Planning and Department of Buildings ("defendants")[2] move to dismiss the complaint pursuant to Rule 12 (c)

Of the Federal Rules of Civil Procedure. The Honorable Sandra J. Feuerstein referred defendants' motion to the

---

[1] Plaintiff filed another case against the New York City Department of Buildings claiming violations under the CZMA, George v. Impressive Home, Inc., et al, 03 CV 40 (DGT)(LB)o, which likewise has a pending motion to dismiss.

[2] The remaining defendant, Ankor Shacaf, was served with a summons and complaint to which he never filed an answer. However, Shacaf conveyed the property at issue to Second Stage, Inc., before this action was commenced. An attorney representing Second Stage wrote to plaintiff on May 9, 2003, informing him of this change in ownership. Plaintiff forwarded a copy of this letter to the Court along with his own letter stating that he had sent a copy of the summons and complaint to Second Stage. By Order dated May 30, 2003, the Court informed plaintiff that mailing copies of the summons and complaint to persons not named as parties was insufficient to effect service of process, and that plaintiff should seek to amend the complaint if he desired to add parties. In plaintiff's Affirmation in Opposition to Defendant's Motion dated August 25, 2003, plaintiff acknowledges that the property formerly owned by Shacaf was conveyed to Second Stage prior to commencement of this action. (Pl's Affirm. in Op. to Def.'s Mot. at 2.) Plaintiff also states that the fence which had obstructed a portion of the easement had been removed, and that his complaint was never amended to include Second Stage. Id. Therefore, plaintiff's complaint against defendant Shacaf should be dismissed as moot.

undersigned for a Report and Recommendation in accordance with 28 U.S.C. § 626(b). It is respectfully recommended that defendants' motion to dismiss should be granted.

BACKGROUND

The following facts are taken from plaintiff's complaint and the exhibits attached thereto. Plaintiff resides in a beachfront bungalow in Far Rockaway Queens. Pursuant to a New York City Department of Buildings permit, plaintiff's neighbor Ankor Shacaf erected a fence that obstructs "one-half of a 24 foot wide right-of way." This 24-foot right-of way is record in plaintiff's, Shacaf's and other property owners' deeds. The fence encloses a construction site for four new homes.

Plaintiff alleges the New York City Department of Buildings granted the permit to defendant Shacaf in violation of the CZMA and environmental programs created pursuant thereto. Defendants move to dismiss plaintiff's action for (1) lack of subject matter jurisdiction, (2) failure to state a claim upon which relief may be granted, and (3) because review of the administrative determination must be brought in state court.

DISCUSSION

1. Standard of Review

Under Rule 12 (c) of the Federal Rules of Civil Procedure, a court must determine whether " the moving party is entitled to judgment as a matter of law." Burns Int'l Sec. Serv., Inc.

v. Int'l Union, United Plant Guard Workers of Am. 47 F.3d 14,16 (2d Cir 1995)). A court should only dismiss a complaint pursuant to Rule 12 (c) if the complaint cannot state any set of facts that would entitle plaintiff to relief. Miller v Wolpoff & Abramsom, L.L.P., 321

F.3d 292, 300 (2d Cir. 2003). In deciding a Rule 12 (c) motion, the court applies the same standard as that applicable to a motion under Rule 12 (b)(6). DeMuria v. Hawkes, 328 F.3d 704, 706 jn.1 (2d Cir. 2003).

The Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. See, e.g., Koppel v. 4987 Corp., 167 F.3d 125, 130 (2d Cir. 1999); Jaghory v. New York State Dep't of Educ., 131 F.3d 326, 329 (2d Cir. 1997). This issue is not whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support his or her claims. See, e.g., Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995), cert denied, 519 U.S. 808 (1996). The Court must "confine its consideration 'to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken,'" Leonard F. v. Israel Disc. Bank of New York, 199 F.3d 99, 107 (2d Cir. 1999) (quoting Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 191)); Hayden v. County of Nassau 180 F.3d 42, 54 (2d Cir. 1999). Where, as here, a party is proceeding *pro se,* the Court is obliged to "read his supporting papers liberally, and will interpret them to raise the strongest arguments that they suggest." Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)

II. CZMA

The CZMA codifies " a national policy to protect the coastal zone, to encourage states to develop coastal zone management programs, to promote cooperation between federal

and state agencies engaged in programs affecting the coastal zone, and to encourage broad participation in

the development of coastal zone management programs." Secretary of the Interior v. California, 464 U.S. 312, 315 (1984). " Through a system of grants and other incentives" states are encouraged to develop coastal management plans, which are then submitted for approval by the Secretary of Commerce. Id. Once the state plan has been approved, " CZMA 307 (c)(1) requires federal activities 'conducting or supporting activities directly affecting the coastal zone' to be 'consistent' with the state plan to the maximum extent practicable." Secretary of the Interior, 464 U.S. at 316. See State of New York v. United States Gen. Servs. Admin., 823F. Supp. 82 (N.D.N.Y. 1993) ("the CZMA and its implementing regulations require 'federal agencies' undertaking 'federal activities' to determine whether these activities directly affect the 'coastal zone.").

Plaintiff alleges that defendants did not comply with "the CZMA and its regulation for shorefront access and protection required as part o the New Waterfront Revitalization Program Policy 8." (Complaint at 5) Under 16 U.S.C. § 1456(d):

State and local governments submitting applications for Federal assistance under Federal programs, in or outside of the coastal zone...shall indicate the views of the appropriate state or local agency as to the relationship of such activities to the approved management program for the coastal zone. Such application shall be submitted and coordinated in accordance with the provisions of section 6506 of Title 31. Federal agencies shall not approve proposed projects that are not consistent with the enforceable policies of a coastal state's management program, except upon a finding by the Secretary that such project is consistent with the purpose of this chapter or necessary in the interest of national security.

Plaintiff's complaint, construed liberally, asserts that consistency review under the CZMA should have been required by the New York City Department of Buildings and Department of Planning prior to Shacaf being granted a permit for the fence. (Id. at 6, 7,11)

The CZMA, however, applies to "Federal Agency activity" that directly affects a coastal zone. 16 U.S.C. § 1456 (c)(1)(A). See Secretary of the Interior, 464 U.S. at 330 ("phrase 'directly affecting' was aimed at activities conducted or supported by federal agencies") A "Federal agency" under the CZMA is "any department, agency, board, commission, council, independent office, or similar entity within the executive branch of the Federal Government, or any wholly owned Federal Government corporation." 15 C.F.R. § 930.17. The New York City Department of Buildings and the New York City Department of Planning are neither entities "within the executive branch of the Federal government" nor "wholly owned Federal Government corporation[s]." Therefore, plaintiff's claims against defendants under the CZMA should be dismissed. Brooklyn Bridge Park Coalition v. Port. Auth. Of New York and New Jersey, 951 F. Supp. 383 (E.D.N.Y. 1997) (dismissing claims that Port Authority actions were inconsistent with New York State's Waterfront Revitalization Plan because the Port Authority is not a federal agency under the CZMA.

Even if, as plaintiff suggests, the City is acting in partnership with the Federal government (Plaintiff's Affirmation in Opposition to Defendant's Motion ¶11), plaintiff's complaint fails to state a claim upon which relief can be granted. Plaintiff alleges that the fence and proposed new homes interfere with "public access and

sensitive preservation of deteriorating waterfronts." (Complaint at 4). Specifically, plaintiff alleges Section 1452 of the CZMA preserves "public access to the beach for recreational purpose" (Complaint at 4), the public trust doctrine provides that "there should be no unnecessary obstruction...of the public's right of access over, and use of the foreshore" (id.), and defendants violated the New Waterfront Revitalization Program Policy 8 entitled "Provide public access to and along New York City's coastal waters" (id. at 5, Exhibit E). However, the deeds attached to plaintiff complaint

demonstrate that the right of way at issue is a privately-owned easement, recorded as an easement in common with other neighbors, rather than a public right of way. (Deeds[3] annexed as Exhibit B and C to Complaint; Letter from City Planning Commission to Plaintiff, dated August 19, 2002, annexed as Exhibit H[4]).

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[3] Shacaf's deed includes the following proviso: "TOGETHER also with a right of way for free and uninterrupted passage over two strips of land one of which is 40 feet in width and the other 24 feet in width...The said 40 feet of way being known ad Beach 26th Street and to be used for Street purposes." (Exhibit B to Complaint).

Plaintiff's deed includes the following proviso: "TOGETHER also with a right of way for free and uninterrupted passage over two strips of land one of which is 40 feet in width and the other 24 feet in width...Subject however to the rights over easterly 12 feet, and the westerly 20 feet of the premises above described." (Exhibit C to Complaint).

Plaintiff's Reply to Defendant's Answer alleges that " the operative deeds in the defendant's and adjoining bungalow owners convey the same ocean easement used exclusively to access to Atlantic Ocean." (Reply at 5).

[4] This letter states that" these easement were created by private owners on private property. ..Therefore neither City nor the City

Therefore, any diminution in the privately owned easement does not diminish public to the beach.

Finally, to the extent that plaintiff alleges private individuals failed to comply with the CZMA, the CZMA provides no private cause of action against a private party who allegedly should have submitted consistency certifications. See State of New York v. DeLyser, 759 F.Supp. 982,987 (W.D.N.Y. 1991) ("Although case law suggests that an injured party may bring an action to force the federal government to fulfill its statutory obligations under CZMA, there is simply no basis on which to infer a right of action on behalf of the State against a private party who conducts activity without a federal permit.."); see also State of New Jersey v. Long Island Power Auth., 30 F.3d 403, 421 (3rd Cir. 1994) (there is no private cause of action under the CZMA against a private party for failure to submit consistency certifications). Therefore, plaintiff's claims under the CZMA should be dismiss for failure to state a

Claim upon which relief may be granted.[5]

III Failure to State a Claim

Plaintiff also claims he was deprived of property without due process of law, in violation of the Fourteenth Amendment's Due Process Clause. The

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Planning Commission has jurisdiction over these private easements and cannot ensure that they remain."

[5] Although defendants seek dismissal for lack of subject matter jurisdiction, plaintiff's claims "are not so insubstantial as to fail to provide an occasion for exercise of subject matter jurisdiction" and are more properly dismissed for failure to state a claim. Fusco v. State of Connecticut, 815 F.2d 201, 204 n.4 (2d Cir. 1987)

only allegation in the complaint regarding due process is the following:
Finally, I would request a (sic) discovery of the record that required reviews and public hearings as part of the due process were conducted why were the adjoining property owners notified by City Planning or the Community Board as to the time and place of the hearings to eliminate and obstruct part of this 24 foot public access right of way.

(Complaint at 8)

Although the complaint is not clear, it appears plaintiff is alleging his due process rights were violated when adjoining property owners were (or more logically, were not) notified of the time and place of the required reviews and public hearings, which are part of the CZMA process. However, as noted above, the review process plaintiff seeks under the CZMA does not apply to the City's granting of a permit to Shacaf to erect the fence. Accordingly, plaintiff's allegation regarding the denial of due process fails to state a claim.

The Court liberally construes plaintiff's complaint to allege a procedural due process claim and assumes that plaintiff intended to assert that he was not notified of any hearing regarding Shacaf's fence, which obstructs half of the common easement. Defendants seek to dismiss this claim for failure to state a claim because the City agencies are not a party to the easement and not responsible for enforcing the easement. Defendants also allege that any Taking claims or claims seeking environmental review are premature and plaintiff's proper vehicle to challenge any acts alleged herein is through an Article 78 proceeding.

In order for a person " to establish that the state has deprived him of property without due process, he must

first identify a property right, second show that the state has deprived him of *that* right, and third show that the deprivations was effected without due process." Mehta v. Surles 905 F.2d 595, 598 (2d Cir. 1990) (emphasis in original). Plaintiff could be claiming a property interest in his easement and that his property's value will be diminished by the construction of the four new homes.

However, the City's act of granting a permit for a fence or the construction could not have *deprived* plaintiff of his property. First, with regard to plaintiff's interest in his property's market value," governmental action allegedly causing a decline in property value has never been held to 'deprive' a person of property within the meaning of the Fourteenth Amendment." Fusco v. State of Connecticut, 815 F.2d 201,206 (2d Cir. 1987). Second, the City's act in granting plaintiff's neighbor a permit to build a fence had no legal impact on the plaintiff's substantive real property rights, no did it adjudicate plaintiff's property rights. See Mehta, 905 F.2dat 598j-99 (group home permit granted to plaintiffs' neighbors that would allegedly overburden a common easement had no legal impact on plaintiff's right to the common easement).

The New York City Charter does not empower the City Department of Buildings as examining or approving plans for construction, requiring construction or alteration, issuing certificate of occupancy). As in Mehta, plaintiff does not allege that the City exercised its eminent domain powers in allowing Shacaf to build the fence. Indeed, plaintiff may enforce his ht to the easement by instituting a trespass or quiet title[6] action

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[6] At least one court has held that common law quiet title and trespass actions could constitute an adequate post-deprivation remedy for a neighbor's claim of rights over property. See Longmoor v. Nilsen, 285 F. Supp,. 2d 132 (D. Conn. 2003)

against the property owner directly. See id at 599 (plaintiffs properly instituted a trespass action to assert defendant's action overburdened the easement). Where the City's action has no legal impact on plaintiff's right to an easement, there can be no deprivation of the property right. Id. at 598. Since, on the facts alleged, the City has not "deprived" plaintiff of any right to the easement, plaintiff fails to allege a constitutional claim upon which relief may be granted. See generally Demuria 328 F.3d at 706 (affirming dismissal for failure to state a claim where plaintiffs failed to identify any deprivation of a constitutionally protected liberty or property interest.[7]

IV. Miscellaneous Claims

Plaintiff's opposition to defendants' motion argues that federal jurisdiction arises under (1) the Public Trust Doctrine, (2) Administrative Procedure Act ("APA") and (3) National Environmental Protection Act ("NEPA"). Even if these claims were properly added to plaintiff's complaint by amendment pursuant to Rule 15 of the Federal Rules of Civil Procedure, the complaint would still be dismissed. Claims involving the public trust doctrine do not arise under federal law, New York v Delyser, 759 F. Supp. 982 (W.D.N.Y 1991)("New York may have an obligation under its own law to hold lands in trust for its public, but that does not give rise to federal question jurisdiction"); accord Vaizburg v.

(police ordered plaintiff to remove chain link fence over road to allegedly facilitate a neighbor's trespass).

[7] To the extent plaintiff alleges a takings claim, his claim would not be ripe as plaintiff must allege that he has sought just compensation by means of an available state procedure. Villager Pond, Inc. v. Town of Darien, 56 F.3d 375 (2d Cir 1995). The Court need not reach defendants's supplemental state law environmental claims should be dismissed without prejudice

United States, 99-CV-3536,2000 WL 356404, at * 2 (E.D.N.Y. Feb. 18, 2000). See also Romeo v. Sherry, 308 F.Supp. 2d 128 (E.D.N.Y.2004) (New York state courts have found "under the public trust doctrine, that large grants of land to private individuals are *ultra vires* and void.").

The Administrative Procedure Act which establishes standards governing judicial review
of findings made by federal administrative agencies, only applies to federal agencies, which are defined as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency..." Dickinson v. Zurko 527 U.S 150 (1999); 5 U.S.C § 701. Similarly, NEPA only applies to "agencies of the Federal Government." Brooklyn Bridge Park Coalition, 951 F.Supp. at 393 (NEPA does not apply to the Port Authority). Since the New York City Department of City Planning and the Department of Buildings are not agencies of the Federal government, plaintiff fails to state a claim against these defendants under these statutes.

Finally, since all of plaintiff federal law claims should be dismissed, the Court should decline to exercise supplemental jurisdiction over any state law claims alleged. Valencia v. Lee, 316 F.3d 299, 305 (2d Cir.2003) (citing 28 U.S.C.§ 1367 (c)(3)). Thus, any claims brought pursuant to state law should be dismissed without prejudice.

CONCLUSION

The Court should grant defendants' motion as the CZMA does not apply to the defendants herein and plaintiff's complaint alleging defendants violated his rights to due process

of law fails to state a claim upon which relief may be granted. Accordingly, plaintiff's complaint should be dismissed in its entirety.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATIONS

Pursuant to 28 U.S.C § 636 (b)(1) and Rule 72 (b) of the Federal Rule of Civil Procedure, bthe parties shall have ten (10) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court. Any request for an extension of time to file objections must be made to the District Judge within the ten day period. Failure to file a timely objection to this Report generally waives any further judicial review. Marcella v. Capital Dist. Physician's Health Plan, Inc., 293 F.3d 42 (2d Cir. 2002); Small v. Secretary of Health and Human Services, 892F.2d 15 (2d Cir.1989); see Thomas v. Arn, 474 U.S. 140 (1985).

SO ORDERED:

s ( )

Lois Bloom
United States Magistrate Judge

Dated: October 13, 2004
Brooklyn, New York

Copies to
HON SANDRA J. FEUERSTEIN U.S.D.J.

RICHARD GEORGE, *Pro Se* Plaintiff
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LOUIS LIPPIN, Esq
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New York, NY 10007

(v) ORDER AND DECISION SANDRA J. FEUERSTEIN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
_____X

RICHARD GEORGE

Plaintiff,

OPINION & ORDER

CV-03-1295 (SJF)(LB)

-against-

ANKOR SHACAF, NEW YORK CITY DEPARTMENT OF CITY PLANNING, QUEENS OFFICE, NEW YORK CITY DEPARTMENT OF BUILDNGS, QUEENS OFFICE

Defendants.

_____X

FEUERSTEIN, J.

Before the Court are objections by plaintiff Richard George (plaintiff) to a Report and Recommendation of United States Magistrate Judge Lois Bloom dated October 13, 2004 (the Report) recommending that the motion of defendants New York City Department of City Planning and New York Department of Buildings (collectively, the City defendants) for dismissal be granted and that the complaint be dismissed in its entirety. The Report

further recommends that the Court should decline to exercise supplemental jurisdiction over any state Laws claims, and that such state law claims should be dismissed without prejudice. For the reasons stated herein, the Court overrules plaintiff's objections and accepts Magistrate Judge Bloom' Report in its entirety.

1

Rule 72 of the Federal Rules of Civil Procedure permits magistrate judges to conduct proceedings on dispositive pretrial matters without the consent of the parties. Fed.R.Civ.P. 72(b). Any portion of a report and recommendation on dispositive matters, to which a timely objection has been made, is reviewed *de novo.* 28 U.S.C.§ 636(b)(1); Fed.R.Civ.P. 72(b). The court, however, is not required to review, under a *de novo* or any other standard, the factual findings or legal conclusions of the magistrate judge as to which no proper objections are interposed. See, Thomas v. Arn 474U.S. 140, 150,106, S.CT. 466, 88 L.ED.2d 435 (1985). Whether or not proper objections have been filed, the district judge may, after review, accept, reject, or modify any of the magistrate judge's findings or recommendations. 28 U.S.C.§ 636(b)(1); Fed.R.Civ.P. 72(b).

II

Plaintiff alleges, in essence, *inter alia*, (1) that he has a viable claim against the City defendants under the Coastal Zone Management Act, 16 U.S.C. § 1451, *et seg.*, since they acted in partnership with the federal government in certain respects; (2) that Magistrate Judge Bloom erred in finding that the right-of-way at issue is a private easement, since it is for the benefit of the public; (3) that Magistrate Judge Bloom ignored 15 C.F.R. § 923 and instead erroneously relied on 15 C.F.R. § 930; (4) that he has a property interest in the

right-of-way; and (6) that his due process claims are ripe for review, since the City defendants rendered a final determination when they approved the permits for the fence and construction. Plaintiff further asks that his objections be considered as a motion for summary judgment.

2

Upon *de novo* review of the Report, and upon careful consideration of plaintiff's objections, the Court overrules plaintiff's objections, and accepts and adopts Magistrate Judge Bloom's Report in its entirety as an Order of the Court. The City defendants' motion to dismiss is granted and the complaint is dismissed in its entirety. The Clerk of the Court is directed to close the case.

SO ORDERED.

s/ ( )

SANDRA J. FEUERSTEIN
United States District Judge

Dated: January 25, 2005
Central Islip, New York

Copies to:

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170A Beach 24th Street
Far Rockaway, New York 11691

OFFICE OF THE CORPORATION COUNSEL
OF THE CITY OF NEW YORK
100 Church Street, Room 5-194
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SENT TO:
Honorable Lois Bloom
United States Magistrage Judge
Richard George
170A Beach 24th Street
Far Rockaway NY 11691

Louis Lippin
Office of the Corporation Counsel
100 Church St.
New York, NY 10007

(vi) UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 05-0886-cv

Richard George

Plaintiff-Appellant,

v.

NYC Department of City Planning, NYC Department of Buildings,
Shacaf Ankor,

Defendants- Appellees,

PETITION EN BANC REVIEW

Richard George
170A Beach 24th Street
Far Rockaway, NY 11691
1-718-868-3123

Petition for Rehearing En Banc Review

(I) Civil Rights Violations Title 42 U.S.C. Section 1983

Petitioner has established standing with a valid claim under Title 42 U.S.C.A. Section 1983 for violations of Fifth, Fourteenth Amendments acknowledged by Magistrate Judge Bloom and Honorable Robert Sack which is part of the legal record. A final decision was made by New York City Department of Buildings and Department of City Planning approval of permits for new construction that obstruct plaintiff's easement in violation of his property rights and rights to Due Process. There were no public hearings on vacating this easement which is also defined in relevant case law as a public access to the waterfront. There is no just compensation for vacating a public easement for a private use. The plaintiff is also entitled to injunctive relief against defendant based on depravation of his First Amendment rights to the use of this easement as a public forum. Relevant case law of the Eastern District provides plaintiff relief on this claim was overlooked by the Appeal Panel; see Paulsen v. Lehman 839 F. Supp.147 (E.D.N.Y. 1993) defendants permanently enjoined, along with agents, employees and successors, and all persons subject to their discretion and control, from imposing any unlawful restraint on plaintiff's right to engage in other First Amendment activities within the pedestrian walkways, thoroughfares and boardwalk area which apply to the plaintiff and 24 foot wide open way.

When the plaintiff complains of a civil rights violation a court must accept the allegations contained in the compliant as true, and draw al reasonable references in favor of the plaintiff, *pro se litigant.* The plaintiff has proven beyond doubt the set of facts in support of his claim which entitle him to relief Conley v. Gibson, 355 U.S. 41, 45-46. This standard is applied with particular strictness when the

plaintiff complains of a civil rights violation, Sheppard v. Beerman 18 F. 3d. 147, 150 (3d Cir. 1994). The claim is sufficient to confer jurisdiction upon federal court, when action is brought on the theory that defendant's conspired with developers to deprive plaintiff of his constitutional rights in violation of Civil Rights Act, Hofferber v. First National Bank of Gymon, OK 437 F.Supp.788 (1977).

The plaintiff's papers and exhibits attached thereto support his claim to his property right of an easement by express grant of an estate owner protected under New York law that is indestructible by the municipality. The United States Court of Appeals Second Circuit does not favor forfeiture of easements by express grant Penn Central Transp. Co. v. Pirate Canoe Club Inc. 463 F.2d 127. Especially when the intent of the owner is to maintain a perpetual open way. Holloway v. Southmayd 130 NY Reports 309, 390 Fed. 825 (1893) " Private easements are independent of the public easement, and are in nature as indestructible by acts of the public authorities, or of the grantor in such a deed". "premises granted should 'perpetually exit as an open way', and in 'legal effect granted' such usual and necessary easements as would be comprehended in the 'free flow of light and air over open way', and in free use thereof ".

The Third Circuit Court of Appeals prevented the city from vacating sidewalk and issuing building permit for new construction in and above sidewalk to which was in private hands, RKO-Stanley Warner Theatres v. Mellon Nat. Bank 436 F. 2d.1297,1298, 1300-1303. A case of *First Impression* for the Court of Appeals Second Circuit with the petitioner's case at bar to enjoin city from vacating easement sidewalk for new construction of housing. More recently by Metroplex on the Atlantics new construction. Plaintiff in this petition seeks relief upon

his claim to enjoin New York City from vacating easement issuing permits for a use outside the scope of a public easement used by the public of over 85 years and removal of all construction, fencing and obstructions off of said easement (emphasis added).

The set of material facts that were overlooked and further support of petitioner's claim, the subject parcel of property was predominantly 100% public trust lands of the Atlantic Ocean, its outer beach and high water line of the Bay of Far Rockaway extending north the Norton's Creek. These public trust lands were artificially filled and subdivided into smaller parcels for the construction of the subject bungalow development and its infrastructure of pedestrian walks. The set of facts pleaded by plaintiff are supported with documented evidence of 1910 maps of estate and assessment of property showing high water line 1910 - 21 show the southern boundary of the Dickerson estate as the Atlantic Ocean with its high water line extending into Bay of Far Rockaway into Norton's Creek estuary at the northern boundary recent tax maps, surveys and deeds filed at the Queens City Register. The Dickerson estate expressly granted several easements ensuring not only the property owner's rights for "free and uninterrupted" access over these lands but also the public's dominate right of access in and over these public trust lands of the outer beach, Bay of Far Rockaway and Norton's Creek.

The original deed states:

"TOGETHER with all the right, title, and interest of the party of the first part of, in and to the lands under the Atlantic Ocean in front of and adjoining said premises, together will all riparian rights appurtenant to said premises. TOGETHER with a Right of Way to the party of the second part, their heirs and assigns forever, for free and uninterrupted passage

over...said strip twenty four feet in width running at right angles to Sea Girt Avenue (formerly Bay Avenue) extended, and extending form Sea Girt Avenue southerly to the Atlantic Ocean," recorded in Liber 2395 page 98, recorded January 24, 1922 by Dickerson Estates. (emphasis added).

The public is entitled to the "free and uninterrupted passage" said strip of land in and over these navigable waters and submerged lands of the estate. The grid of pedestrian walks infrastructure is constructive notice of access over these public trust lands connect to the Atlantic Ocean; See RKO-Stanley Warner Theatres v. Mellon Nat. Bank *Id.*, plaintiff can enjoin city municipal agencies Paulsen v. Lehman *Id.*, from obstructing a public forum. Holloway v. Southmayd *Id.* the estate owner" assigns forever" to plaintiff and defendants as successors to the deed " free and uninterrupted passage" over the open way to access the Atlantic Ocean. The plaintiff referenced original deed of 1921 id. as annexed in Exhibits B and C; and in Appeal Brief Exhibit # 16 and on page 4 Complaint 03-CV-1295. Covenants, conditions and easements and like restrictions on property comprise a special set of land use devices recording controls that run with the land. They are legal and binding to successors in title and deed. These controls limit the use of land, are well established in law, and continue in their effect if the property is sold and is applicable with petitioner's property and the set of facts he desires to be included with his claim.

The Second Circuit Court of Appeals granted summary judgment de novo in favor of plaintiff giving no deference to district court's determination of state law. Instead, it is our task to ascertain and apply New York law, Sutera v. Go Jokir Inc. 86 F.3d 289 (2nd Cir. 1996), easements under New York law are defined

by rights and obligations they create. More than a personal privilege to use another's land, it is an actual interest in that land, Sutera v. Go Jokir Inc., 289, 301 *Id.* the Second Circuit Court of Appeals favors injunction against obstructions of easements. Appeal Panel should have ordered summary judgment in favor of plaintiff with this case at bar as petitioner is entitled to the removal of all obstructions and injunction to prevent any more obstructions by NYC with this En Banc review; also see Columbia Gas Trans. v. Bishop 809 F. Supp. 220, 222 (W.D. N. Y. 1992), plaintiff's motion for summary judgment granted, defendant enjoined to remove at his own expense any structures or encroachments on easement. Defendant cannot obstruct interfere with plaintiff's easement with his planned condominium project Bachmen v. Hecht 659 F. Supp. 308, 309 (D. Virgin Islands 1986) also see, Gisondi v. Nyack Mews Condominium 673 N.Y.S.2D 743. The District Court and Court of Appeals Second Circuit as well as other circuits favor injunction and removal of obstructions off of easements which is petitioner intention with this En Banc review to facilitate a proper decision on the merits and with no issue of material fact to be decided the plaintiff is entitled to summary judgment in has favor F. Rule Civ. P. 56.

II. The Coastal Zone Management Act 16 U.S.C. §1451 *et seq.* financial awards applies to New York City and confer subject matter jurisdiction to plaintiff's action

The plaintiff has brought an action against New York City municipal agencies and non-Federal entities to enjoin construction of residential developmental projects which confer federal subject matter jurisdiction to the extent that New York City is acting in partnership with the Federal government with the receipt of federal financial awards and involvement

that warrant the imposition of the Costal Zone Management Act of 1972,[CZMA or Act], its implementing regulations 15 C.F.R. Part 923, the National Environmental Policy Act, the National Historic Preservation Act, Endangered Species Act, Civil Rights Act, National Flood Insurance Act. New York City has seized the opportunity provided by the Coastal Zone Management Act through its Waterfront Revitalization Program approved September 30, 1982 by the Department of Commerce, see FEIS Appeal Exhibits #5, 6, and 7.

A.* CZMA financial awards to New York City that provide standing for plaintiff were overlooked by Appeal Panel:** Plaintiff provided ample evidence attached to his Appeal Brief that **include *essential set of material facts overlooked by the Panel of Judges and remain undisputed by defendants:

New York City Waterfront Revitalization Program was approved September 30, 1982 by the U.S. Department of Commerce in 1982; see FEIS annexed in Appeal ***Exhibits #'s 5,6,7,8, and 9***. The work required to be done by New York City in the Contract Award for Local Coastal Management is to advance its Waterfront Revitalization Program particularly water quality improvements, wetlands restoration, public access, and park development in implementing the authorities in the award contract. The authorities for Waterfront Revitalization of New York's coasts have their basis in Article I Section 8 of the U.S. Constitution under the Commerce Clause, the many statutes, National Policies § 1452 (1) & (2) (303) (A) through (K), (3) (1) to (6) and enforceable coastal policies §1453 (6a) and mandatory adoption of with the rules and regulations promulgated by the Secretary of Commerce under

Administrative Grants §1455 (c) and (d) that require "full participation by relevant Federal agencies, State agencies, local governments, regional organizations, port authorities, and other interested parties and individuals, public and private, which is adequate to carry out the purposes of this chapter and is consistent with the policy declared in section 1452 if this chapter." These authorities bind each party which exercises statutory authority that is part of the management program to conformance with relevant enforceable policies and management techniques 15 C.F.R. §923.43 (c) (1) (2). The management program authorities provide grounds for a citizen in taking action to ensure compliance of networked agencies with the program §923.43 (c) (1) (2) (i). (emphasis added).

These essential set of material facts confer standing and federal subject matter jurisdiction with plaintiff's action in which he seeks to redress a wrong for violations of Federal law and regulations 1 Am, Jur 2d. §4, Nassif v. Municipal Court (4th Dist) 214 Cal App. 3rd 1294, with by NYC acting in partnership with the Federal government through the CZMA contract award. His case include ***Appeal Exhibit #5*** ORGANIZATION and IMPLEMENTATION long term management and maintenance of waterfront development and activities pursuant to New York City's Waterfront Revitalization Program is the city's principal coastal zone management tool and establishes the *responsibilities* of the Department of City Planning acting as the City Coastal Commission and the authorities that play a key role in the decision making and management of the coastal area of New York. Appeal Panel in their decision.

Public access to the waterfront is a priority and primary importance especially in urban waterfront

redevelopment in advancing national and regional goals and objectives in carrying out the purposes of CZMA consistent with Title 16 U.S.C. §1452 (303) (E) and (H) through the programmatic funding to New York City. See the legal instrument financial award contract Work Program Local Coastal Management, Work to be done, and Task Implementation Appeal Exhibit #7 pgs. 5 & 6 as defined in 15 C.F.R. §923.132 (e) and required by Section 306 Administrative Grants §1455 (c) and (d), id., and Section 314 Interagency coordination and cooperation, Title IV of the Intergovernmental Cooperation Act of 1968 id.

Public Access to the waterfront is defined by New York City Department of City Planning who was part of the Management Team contributing to the CEQR Technical Manuel page 4-12. City Planning has defined Public Access as:

"Any area of publicly accessible open space on a waterfront property, as well as any pedestrian way that provides a route for a waterfront public access area to a public street, public park, public space, or public access area"

City Planning's Public Access to the waterfront includes the plaintiff's property and express perpetual grant of a 24 foot open way and pedestrian walk that provides " free and uninterrupted access" from " Sea Girt Avenue" a public street as defined id. in and over the " public trust lands" of the artificial fill of the Atlantic Ocean Bay of Far Rockaway to access the "Atlantic Ocean" a waterfront public access area as defined id. This easement was "assigned forever" by the estate owner Edward Dickerson and is indestructible by the municipality under the CZMA Public Access Requirements Policy 8 and State Policy

19 and 20. See also, Holloway v. Southmayd *Id.*, RKO-Stanley Warner Theatres v. Mellon Nat. Bank *Id.*, also Paulsen v. Lehman *Id.*, in Part I Civil Rights violations §1983.

Public Access to the waterfront as defined in CEQR id is also enforced by New York City's Department of City Planning and Department of Buildings through its Waterfront Revitalization Program. New York City Waterfront Revitalization Program clearly has the authority to review projects inland and include the coastal boundary of the Rockaway Peninsula *page 5 of NYC New WRP Appeal Exhibit #9*, and enforce the public access requirements, walkway construction and maintenance prior to issuing permits as annexed in *plaintiff's Appeal Exhibit #12* the U.S. Department of Commerce evaluation findings November 1984 to June 1987 on page 13, #4; the community has the opportunity to implement a management program for the best use and development of those resources. (emphasis added)
See Nat. Assn. of Homebuilders of U.S & N.J. v.State of N.J., 64 F. Supp. 2d. 354; 1999 U.S. Dist. Lexis 14678, ordered summary judgment in favor of State's enforcement CZMA Public Access Rules to require walkway construction and maintenance over public trust lands prior to issuing permits to developers. New York was delegated this responsibility to enforce the CZMA Public Access Rules provides for this private right of action and standing by plaintiff with the city acting in partnership with the Federal Government as outlined in this petition.

New York City is legally required to review proposed projects, plans and activities proposed by individuals and local, state and federal discretionary actions for consistency with the Waterfront

Revitalization Program prior to issuing a permit, certificate, license, or other entitlement or to other wise authorize a proposed project or activity applies to all projects in the designated coastal zone defined in the City Environmental Quality Review Technical Manuel Appendices page 4 of 37 §617.2 Definitions and page 3-17 Waterfront Revitalization Program which concurs with applicable Federal law and rules and regulations promulgated by the U.S. Department of Commerce under Coastal Zone Management Act of 1972 it regulations and NEPA that applies to this case at bar overlooked by the Panel with their decision. (emphasis added)

New York City is required to ensure compliance of activities through the legal instrument of the *federal financial awards* as defined in 15 C.F.R.§923.132 (e) to implement of authorities in award contract through its WRP and "advance public access" to the waterfront on plaintiff's property. See Lynch v. U.S.,292 U.S. 571, 579.

The contract award specifically requires that municipalities have demonstrated a high level of commitment or made significant progress to advance [L]WRP's public access requirements especially in populated urban waterfront redevelopment that include the Rockaway Peninsula. NYC WRP Policy 8 implementation include standards to "preserve existing access to the shoreline' that include the plaintiff's "existing easements on privately-owned property" over the" lands under water (public trust lands)" of the Atlantic Ocean and to encourage public access improvements as a component public access projects. New York City Policy 8.1 is legally required to " Preserve protect and maintain existing physical, visual and recreational access to the waterfront" and " Maintain if good repair existing public access areas to

ensure public safety and enhance enjoyment" and Policy 8.2 " Encourage the development and maintenance of high quality public spaces in appropriate locations, particularly those that would facilitate connection of existing waterfront public access spaces and allow continuous access along the shore" [NYC WRP 8.2] (emphasis added).

That include the subject 24 foot wide easement and plaintiff's property and this case at bar. The essential set of material facts and evidence ***overlooked by the Appeal Panel*** Appeal Exhibits #1 through 24 and include:

Appeal Exhibit #5 ORGANIZATION and IMPLEMENTATION long term management and maintenance of waterfront development and activities of New York City's Waterfront Revitalization Program and the *responsibilities* of the Department of City Planning acting as the City Coastal Commission, and Lead permitting agencies such as NYC Dept. of Buildings; ***Appeal Exhibits # 9*** NYC WRP designated coastal zone includes the entire Rockaway Peninsula and plaintiff's property; and ***Appeal Exhibit # 12*** U.S. D.O.C. confirmed that NYC clearly has the authority to review projects inland and 3 miles for consistency seaward and provide public access prior to issuing permits and ***Appeal Exhibit #13*** the deeds, titles and surveys and maps that show the subject easement and bungalow development was constructed over public trust lands of the Atlantic Ocean and plaintiff's Section 1983 pleadings in Part I id; also NYC Waterfront Revitalization Program defined in CEQR Manuel applies to all projects in the designated coastal zone, as annexed Plaintiff's Affirmation Attach. A-18 CEQR Definition page 4-17.

This is a case of *First Impression* pleaded by plaintiff since there are none like it in any district or circuit court. The many violations environmental statutes provide standing for this private right of action against the municipality with NYC is acting in partnership with the Federal government in the receipt CZMA Section 305 and Section 306 Administrative Awards. ***The essential material facts have remained undisputed by defendants and Appeal Panel.***

The plaintiff's claim is further supported by New York City Corporation Council Louise Lippin in her Memorandum of Law 03-CV-1295 on page 5;

"The decision makes it clear that there was no intention for these environmental statutes to permit a private right of action against a local government, or a municipal agency. The Court noted that these federal statutes by their express language operate only upon federal agencies and impose no duties upon municipalities, unless that municipality is acing in partnership with the federal government usually in the receipt of federal aid." Citing Town of North Hempstead v. Village of North Hills 482 F. Supp. 900 at 903.

Magistrate Judge Bloom also acknowledges that:

" Plaintiff alleges that the fence and proposed new homes will interfere with " public access and sensitive preservation of deteriorating waterfronts (Compliant at 4)",..." and defendants violated the New Waterfront Revitalization Program Policy 8 entitled Provide access to and along New York City's' coastal waters (see Exhibit E Compliant; see all Appeal Exhibits and id.). " Policy 8 specifically was intended "preserve existing

access to the shoreline provided by facilities such as existing easements on privately owned property".

Senior Appeal Attorney Scott Shorr at the Oral Argument October 21, 2005 basically stating that there are no cases or any circuit that have decided a private right of action by a citizen against the municipality under the CZMA. The Honorable Judge Robert D. Sack further agreed that plaintiff's action involves any construction that would interfere with his easement. The Honorable Robert D. Sack serving on the Committee on Financial Disclosure Congressional Appropriations 2004 would be able to ascertain the essential material facts that support plaintiff pleadings and exhibits #1 to #24 and Congressional Appropriations awarded to NYC to implement the CZMA. The Honorable Dennis Jacobs serving on the Committee on Judicial Resources 2004 would be able to find relevant judicial resources that support plaintiff's pleadings.

B. Appeal Panel decision shorn of CZMA text and substance does not afford dispositive weight in their decision. The Court of Appeals cannot "explicitly contemplate" or "assume" what Congress intended in the CZMA by substituting text from education amendments Alexander v. Sandoval, 532 U.S. 275, 286, 288 (Discussion on page 4, lines 1 through 4) *or* the Employment Retirement Income Security Act Gerosa v. Savasta & Co. 329 F. 3d 317, 322 (2d, Cir. 2003) are irrelevant to the substantial environmental law created by Congress P.L. 92-583. The Court of Appeals have never accorded dispositive weight to context shorn of text. Reliance on isolated fragments of the CZMA §1456 (b) and (d) for other federal programs [page 3 and 4 of discussion] without consideration of the overall scheme, purpose, structure and legal framework of the CZMA, its

Declaration of Policy Section 303, and the Congressional Appropriations and contract award intended for New York City Waterfront Revitalization Program as outlined in the plaintiff's papers and attachments is an exercise fraught with hazards New England Power Co.455 U.S. 331 at 342, 343. The Court of Appeals Panel have no authority to rewrite its legislation based on mere contemplation or assume what Congress created from text of unrelated statutes in Alexander v. Sandoval, and Gerosa v. Savasta & Co.Id. and in fragments of CZMA as codified_without considering the mandatory requirements §1455 (d) Section 306 rules and regulations 15 C.F.R. §923 that require full participation by a citizen in carrying out the purposes of consistent with the Act. The Court of Appeals must construe the Act as it is written, as legislative history indicates it was intended New England Power Co. 455 U.S. 331, 343 and accord significant weight to the entire text of the Act, the financial award contract partnership that provide standing for plaintiff against municipality.

Congress incorporated the recommendations of the Council on Environmental Quality's First Annual Report that required a National land use program with full participation from local government and American citizens since it was determined that " land is treated as a resource to be managed and not merely as a commodity to be marketed. While zoning should implement sound land use plans it does not necessarily do so and has had less success in preserving open space and channeling growth in developing areas. Although zoning is designed to protect the welfare of the general public, the close relationship between the local agencies and land developers results in a breach of zoning law by granting variances or amendments once the pressure of development is on." (emphasis added).

Congressional Findings Section 302 and Declaration of Policy Section 303 [and 306 and 313 Id.]16 U.S.C. § 1451, §1452 *et. seq.* explicitly requires "full participation" from members of the public, private individuals and interested parties. The Appeal Panel cannot "assume" Congress intended to "preclude private enforcement" through text of unrelated statutes that contemplate "public enforcement only" in their discussion page 4 lines 1 to 3 in order to justify the lower court's decision and rule contrary to Federal law.

The CZMA text explicitly intends to " preserve, protect, develop and whenever possible to restore or enhance the resources of the nation's Coastal Zone" §1452; the future well being of the Nation" §1451 (b), of "the well-being of all citizens;" §1451 (e). " These phrases do not suggest an intent to benefit any particular class, but to promote the interest of all" New York State v. DeLyser, 759 F. Supp. 982, 988 (W.D.N.Y. 1991). The CZMA was designed to include "broad participation" in developing coastal zone management tools and in implementing the CZMA through approved local waterfront revitalization programs:

The receipt of §1455 (d) Section 306. Administrative Awards requires mandatory "full participation by relevant Federal agencies, State agencies, local governments, regional organizations, port authorities, and other interested parties and individuals, public and private, which is adequate to carry out the purposes of this title consistent with 16 U.S.C. §1452 Section 303". See also regulation §923.43 (c) (1) (2) (i) a citizen can take action; and §923.132 (e) *financial awards defined* Id.

The Panel overlooked essential material evidence from the delegated authority the U.S Dept. of Commerce annexed in Appeal Exhibit #1 (emphasis added);

The U.S. DOC publication on Coastal Zone Management on page 13 The Local Role to implement delegated authorities including permitting, and provide a forum for citizen participation and receipt CZM support for local projects that can include plaintiff's property and easement to access the waterfront (emphasis added).

To preclude judicial review must upon its face give clear and convincing evidence of an intent to withhold it. "The mere failure to provide specifically by a statute for judicial review is certainly no evidence of intent to withhold review" H.R.No.1980, 79th Congress 2nd Session, 41. There is no intent to withhold judicial review as it is explicit in the statute and regulations requires full participation from citizens, private and public and interested parties Id. See 24 Hour Fuel Oil Corp. v. Long Island 903 F. Supp. 393 (E.D.N.Y.1995) [Appeal Brief page 20, 22, 23].

C. Appeal Panel misinterpretation of case law pertaining to a State's cause of action does not apply to plaintiff's private right of action against the municipality or lower courts decision. Congressional intent:

"... the " Coastal zone" to include non-Federal coastal waters and non Federal land beneath coastal waters, shore lands and transitional, and interdial salt marshes, wetlands and beaches. The States may delegate to local governments all of the management responsibilities under the ACT.

The plaintiff provided evidence that the entire Rockaway Peninsula is in the "Coastal zone" and NYC has the responsibility for implementing the 10 WRP Policies and NY States 44 Coastal Policies annexed in Appeal Exhibit #9 page 3 and 5.

" The outer limit of the zone is the outer limit of the territorial sea, beyond which the States have no clear authority to act" or "diminish any rights reserved or possessed by the Federal Government under Submerged Lands Act or Outer Continental Shelf Lands Act". The State has no authority over land subject solely to the discretion of the Federal Government", CZMA Legislative History Analysis of *Section 304 Definitions.*

The Appeal Panel erred with their decision adopting the interpretation of district courts, other circuits and the Second Circuit in cases cited involve implied causes of action by a State against individuals conducting activities outside State's coastal zone boundary. The interpretations on page 5 and 6 the discussion do not apply to plaintiff's private right of action against New York municipality. Dept. of Envtl. Prot. & Energy v.Long Island Power Auth,. 30 F. 3rd 403, 423 (3rd Cir. 1994) " As the third Circuit concluded, the Act's general statement of intent to enhance state authority, given effect through explicit measures in the statute itself, cannot be taken to indicate an intent also to create rights of actions *by a state* that the statute fails to mention". Dept. of Envtl. Prot. & Energy, 403 Id., nor does shipment of reactor fuel require *environmental assessments of NEPA or trigger the CZMA consistency reviews;* see also California ex. rel. Brown v. Watt, 683 F.2d 1253, 1254, the federal defendants did not violate federal statutes of the CZMA, *nor* does the State have clear authority to

act in the Other Continental Shelf (OCS) or Federal territorial Seas [Section 304 id.]. The *State* does not have an implied right of action against an individual who conducts an activity *without a federal permit*, State of New York v. Delyser, 759 F. Supp. 982 (W.D.N.Y. 1991; or *conducts an activity for oil exploration with Federal licenses on the Outer Continental Shelf*, Commonwealth of Mass. v. Andrus, 594 F.2d. 872 (1st. Cir. Court of Appeals 1979). Hon. Dennis Jacobs misinterpreted this case law that does not support his decision. (emphasis added).

The ACT explicitly created two regimes land and water under Section 304. The Federal waters is the exclusive jurisdictional grant of Federal Government and its agencies and is neither a jurisdictional grant or basis for stating a claim by a State, Town of N. Hempstead v. Village of N. Hills, 482 F. Supp 900. 987, citing Commonwealth of Mass. v. Andrus Id. The OCS is exclusive Federal jurisdictional grant where the state has no authority. The land uses in the coastal zone are the exclusive jurisdictional grant of States who delegate authority to local governments and New York City implements land uses on plaintiff's property the subject of this case at bar.

A closer examination of the facts distinguish plaintiff's case from the citizens in the Town of N. Hempstead v. Village of N. Hills Id., the citizens in both towns did not plead the CZMA, nor did either town have an approved waterfront revitalization program in 1979 and up to 2003 that warrant the imposition of the CZMA or NEPA in their action. The CZMA Award contract does not list either town with an approved waterfront revitalization program, see Appeal Brief Exhibit #7 page 6]. The plaintiff provided ample evidence that New York City is acting in partnership

with the Federal Government with its approved Waterfront Revitalization Program Appeal Exhibits # 5, 6, 7, 8 & 9 that warrant imposition of the environmental statutes [Exhibit #7]. Plaintiff has standing to ensure compliance by New York municipal agencies with the CZMA Public Access Requirements Section 309, the National Environmental Policy Act, the National Historic Preservation Act, Endangered Species Act, Civil Rights Act, National Flood Insurance Act, All Relevant State and NYC Coastal Policies on his property (see award Contract Appeal Exhibit #7 p A-11, A-12, p.5 &6) the statutes, and Local Coastal Management). The plaintiff set of material facts and exhibits attached thereto have remained undisputed by defendants in this Appeal.

Conclusion

The Hon. Dennis Jacobs interpretation as pleaded in this petition does not apply to plaintiff's case. The Court of Appeals Second Circuit as well as other circuits favor injunction and removal of obstructions off of easements. Plaintiff has standing under Title 42 U.S.C.A. Section 1983, 5th, 14th and 1st Const. Amend, and under the CZMA, a case of *First Impression* which applies to New York City and Federal CZMA awards. There is no issue of material fact to be decided the plaintiff is entitled to summary judgment in has favor F. Rule Civ. P. 56.

Richard George
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(vii) Petition for Rehearing DENIED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NY 10007

Rosanne B. MacKehnie
CLERK

Date: 5/4/06

Docket Number.	**05-0886-cv**
Short Title	**George v. NYC Department of City Planning**
DC Docket Number	**03-cv-1295**
DC:	**EDNY (BROOKLYN)**
Dc Judge:	**Honorable Sandra Feuerstein**

At stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 5th day of May two thousand six.

George v. Department of City Planning

A petition for panel and a petition for rehearing en banc having been filed herein by the appellant Richard George. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for the rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc transmitted to the judges for the court in regular active service and to any judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court

Roseann B. Mackehnie, Clerk

By: Tracy W. Young *s* (____)
Motion staff attorney